

# Privacy Matters: Payment Cards Center Workshop on the Right to Privacy and the Financial Services Industry

BY SARAH A. BURKE

**P**assage of the Gramm-Leach-Bliley (GLB) Act in 1999 re-opened the debate on consumers' right to privacy in financial transactions. To broaden awareness of this debate, the Philadelphia Fed's Payment Cards Center sponsored a workshop, led by University of Pennsylvania law professor Anita L. Allen. Professor Allen opened the meeting with a general discussion of privacy issues, then focused on privacy provisions of GLB. In this article, Sally Burke outlines some of the primary concerns and summarizes Professor Allen's presentation.

Also known as the Financial Services Modernization Act, Gramm-Leach-Bliley (GLB) allows financial institutions to engage in certain types of activities that were formerly prohibited.

In effect, GLB repealed sections 20 and 32 of the Glass-Steagall Act, which, among other things, separated commercial and investment banking. GLB also created an entity called a financial holding company (FHC). Any bank holding company that qualifies to be an FHC may engage

in a broad range of finance-related activities, including underwriting insurance and securities. This closer union between banks and other financial services organizations increased concerns about how customer information gathered by financial institutions would be shared, especially with unaffiliated third parties.

The privacy provisions of GLB describe the conditions under which financial institutions<sup>1</sup> may disclose nonpublic personal information about

consumers to nonaffiliated third parties, require such institutions to provide notice to their customers about their privacy policies, and permit the consumer to opt out of those disclosures, subject to certain exceptions. Congress has provided broad rule-making authority to eight federal agencies, each of which regulates a different aspect of the financial services industry.<sup>2</sup>

The agencies' privacy regulations apply to financial institutions only with respect to the nonpublic personal information about individuals who obtain financial products or services primarily for personal, family, or household purposes. The privacy regulations do not apply to information about companies or about individuals who obtain financial products or services for business, commercial, or agricultural purposes.

Earlier this year, the Payment Cards Center of the Federal Reserve Bank of Philadelphia sponsored a workshop with Anita L. Allen, a professor of law at the University of Pennsylvania. Professor Allen, who has written and lectured extensively about the legal aspects of privacy, led a discussion with Philadelphia Fed officers and staff about privacy issues in general and privacy provisions under GLB in particular. Her remarks provided a



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<sup>1</sup> For the purposes of the privacy provisions, the term "financial institution" is defined to mean any institution — whether or not affiliated with a bank — that engages in activities permissible for a financial holding company. Thus, the term would include banks, thrifts, mortgage companies, and insurance and securities firms.

<sup>2</sup> In accordance with the statutory mandate, the agencies, including the Board, worked together to implement privacy regulations that contain substantively identical provisions. The Board's privacy rule, Regulation P (12 C.F.R. Part 216), applies to the U.S. offices of entities for which the Board has primary supervisory authority.

historical timeline for these issues and a context for GLB.

To start, Professor Allen offered her definition of privacy: “modes by which people, personal information, certain personal property, and personal decision-making can be made less accessible to others.” She noted further that privacy is protected not only by law but also “by cultural norms, ethics, and business and professional practices.” She also listed four types of privacy: informational, physical, decisional, and proprietary. GLB privacy provisions fall mostly into the informational category. (See *Types of Privacy*.)

Of course, Professor Allen acknowledged that when we talk about privacy, a basic question arises: Why is it important? Because, Professor Allen stated, it involves factors such as personhood, individuality, personal and social relationships, autonomy, and tolerance, to name just a few. But, she cautioned, privacy rights are not

absolute. Such rights must often be weighed against other considerations such as public health and national security. (See *Privacy vs. Other Values, Needs, and Policies*.)

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In fact, the word “privacy” does not appear in the Constitution; however, Professor Allen noted that the Supreme Court has interpreted five of the 10 original Bill of Rights guarantees and the 14<sup>th</sup> Amendment as protective of privacy. For example, the Court has stated that the search and seizure protections of the Fourth Amendment relate not only to the physical privacy of a citizen’s home but also to the informational privacy of a citizen’s papers, correspondence, conversations,

and electronic communications.

Professor Allen believes that mistaken ideas about citizens’ rights to privacy are quite common. That’s one reason she thinks people don’t shop around for another bank even when they’re concerned about privacy – they *assume* that their depository institution protects their privacy as a matter of course.

Articles in the popular press support this belief that people have exaggerated notions about their right to privacy. In the March 2001 issue of *The Atlantic Monthly*, author Toby Lester states that people tend to assume that privacy “is one of the bedrock rights upon which American society is built.” But as Lester’s article, “The Reinvention of Privacy,” points out, Americans originally thought of privacy as “a physical concept.” Citing the work of Robert Ellis Smith, Lester says that for most Americans before the end of the 19<sup>th</sup> century, protecting one’s privacy or

Types of Privacy	Examples
Informational Privacy (most important for GLB)	Informational privacy is at issue in cases about access to medical records, employer access to email, on-line anonymity, data encryption, and executive privilege. Confidentiality and secrecy are informational privacy concerns. Concerns about informational privacy go by many names, including secrecy, confidentiality, anonymity, security, data protection, and fair information practices.
Physical Privacy	Physical privacy is at issue in cases about government search and seizure, peeping toms, and “ambush” journalism. Seclusion and solitude are physical privacy concerns. The home is the traditional seat of physical privacy. Bodily integrity is sometimes an important physical privacy concern.
Decisional Privacy	Decisional privacy is at issue in cases about abortion rights and the right to assisted suicide. The rights of homosexuals and families to direct their own lives are commonly styled as privacy concerns in the decisional sense.
Proprietary Privacy	Proprietary privacy is at issue in cases about publicity rights, identity, and the ownership of the body. The rights of celebrities and others to control the attributes of their personal identities are commonly styled as privacy concerns in the proprietary sense.
Source: Professor Anita L. Allen, University of Pennsylvania Law School	

acquiring more of it was simply a matter of moving west, where “there were fewer people likely to know or care what one was doing.” Today, although people still retain a sense of physical privacy about their homes and other property, privacy has acquired an abstract aspect as well, thanks to developments such as personal computers and the Internet.

However, PCs and cyberspace are just the most recent links in an age-old chain. In fact, technology has spurred interest in privacy issues before. Lester’s article offers this example. In 1890, Samuel Warren and Louis Brandeis wrote an article called “The Right to Privacy” for the *Harvard Law Review*. Cameras and high-speed printing presses were the new technologies that prompted Warren and Brandeis to write their treatise.

Although issues about certain types of privacy have obviously been in the public consciousness for a long time, privacy as it relates to financial services is a relatively new phenomenon. Through the 1960s, Professor Allen said, financial services generally entailed a contractual relationship between consumers and their banks, and banks — as yet unhampered by legal considerations — had a lot of freedom to share information about customers.

But the 1960s saw a resurgence of interest in matters of privacy. Once again, technology drove the discussion. The development of computers in the 1960s led to concerns about how and where information was stored and who had access to it. The cold war and the domestic social and political movements of that decade also raised questions about surveillance, particularly government “spying” on private citizens.

Legislative action to address these concerns started to come about in the 1970s. In the financial services area, Congress passed the Fair Credit Reporting Act (FCRA) in October 1970. The FCRA, which applies only to consumers, covers the confidentiality,

accuracy, relevance, and proper use of credit information. This law also restricts access to consumers’ credit reports. In 1974, the Privacy Act mandated “fair information practices” and limited third-party access to personal information contained in record systems. That same year, Congress passed the Freedom of Information Act (FOIA), which gave the public access to government records. But FOIA does contain exceptions for medical, personnel, and “similar files.” The Right to Financial Privacy Act of 1978 extended the rights in these earlier laws by governing certain banking and financial transactions. Among other things, this act restrains the government’s access to some types of financial information and prohibits the unauthorized release of records by financial institutions.

In the 1980s, Congress passed a string of legislation regarding a number of privacy issues; the most important for financial services was the Fair Credit and Charge Card Disclosure Act of 1988. This legislation expanded some of the disclosure provisions of the Truth in Lending Act. In short, it required all credit and charge card issuers to provide consumers with specific information on interest rates, fees, etc., in an easy-to-

read format or to provide a toll-free number and an address from which consumers could obtain such details.

Most recently, Congress passed GLB in 1999. Under its privacy provisions, GLB requires a financial institution to inform consumers that it may disclose — or reserve the right to disclose — “nonpublic personal information” to nonaffiliated third parties. In addition, consumers must be offered the opportunity to “opt out” of such disclosures, and the financial institution must give consumers “reasonable means” by which to exercise their opt-out right. The law further mandates that financial institutions must inform customers about information-sharing policies at the start of the relationship and annually thereafter. All financial services organizations had to comply with these provisions by July 1, 2001.

Of course, with the trend toward a global marketplace, a question arises concerning just how much protection consumers derive from the privacy provisions of GLB. Many national and international companies have so many affiliates that “nonpublic personal information” can legitimately be shared with numerous entities.

### Privacy vs. Other Values, Needs, and Policies

Privacy vs.

- First Amendment Freedom of Speech and Press
- Newsworthiness of Information
- The Public’s Right to Know About Government, Officials, and Businesses
- National Defense, Military Necessity
- Criminal Law Enforcement
- Public Health and Safety
- Employer Necessity or Business Profitability
- Government “Special Needs”
- Efficiency, Expense, or Administrative Necessity
- Fiduciary Values, e.g., Trust, Accountability, or Loyalty

Source: Professor Anita L. Allen, University of Pennsylvania Law School




Moreover, GLB permits joint marketing arrangements with nonaffiliated third parties. Noting some of the social differences between today and 40 years ago, Dr. Allen, quoting sociologist Amitai Etzioni, stated that in matters of

who's watching whom, consumers must now worry about "the shift from Big Brother to Big Business."

Professor Allen also explained that GLB is an extension of the government intervention that began in the 1970s. Furthermore, it changes the relationship between banker and consumer by imposing a statutory obligation, effectively replacing the contractual relationship that previously existed.

The legal aspects of privacy, of course, have many more facets than those presented here. So, too, all of the details of the financial modernization legislation are beyond the scope of this article.<sup>3</sup> However, the Payment Cards

Center at the Federal Reserve Bank of Philadelphia hopes that the discussion with Anita Allen and the subject of privacy, especially as it relates to the financial services industry, will further stimulate consumers', regulators', and the industry's interest in this important topic.

As Peter Burns, director of the Center noted, "There is arguably no sector in financial services where the collection and management of consumer data are more central to the core business model than in the payment cards industry. Center-sponsored workshops and discussions with thoughtful observers such as Dr. Allen are important tools for helping to inform the underlying policy debate." 

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<sup>3</sup> For an excellent summary of the provisions of Gramm-Leach-Bliley, see the Federal Reserve Bank of Philadelphia's *Banking Legislation and Policy* newsletter, Vol. 18, No. 4, October-December 1999. The article is available on the Bank's web site at: [www.phil.frb.org/files/blkp/blkp499.pdf](http://www.phil.frb.org/files/blkp/blkp499.pdf). Or see the Philadelphia Fed's Supervision, Regulation, and Credit site at <http://www.phil.frb.org/src/glb.html>.